No. 11,844

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estate of C. A. Reed Furniture Company (a Corporation), Bankrupt,

Appellant,

vs.

CALIFORNIA BANK (a Corporation), and LAWRENCE WAREHOUSE COMPANY (a Corporation),

Defendants,

LAWRENCE WAREHOUSE COMPANY (a Corporation),

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellee agrees that the jurisdictional statement on page 4 of appellant's brief is correct.

STATEMENT OF THE CASE.

This is an action by the trustee in bankruptcy of the C. A. Reed Furniture Company to invalidate cer-

tain non-negotiable warehouse receipts issued by appellee Lawrence Warehouse Company to the California Bank covering goods deposited with Lawrence by the bankrupt. There are no disputed questions of fact. The only controversy between the parties relates to the legal effect, if any, of Section 1858 of the Civil Code of California upon the receipts in question. The question arose in the District Court upon the motion of appellee for summary judgment. After argument, the District Court granted appellee's motion and entered a summary judgment. This appeal followed.

The opening statement of appellant's brief is substantially correct. It should be noted, however, that all of the receipts which are the subject of this action were non-negotiable. In addition, appellant does not claim that any of the funds received on the security of these receipts went to, or benefited anyone other than the C. A. Reed Furniture Company, appellant's predecessor in interest.

Briefly stated, appellant's only claim is that the warehouse receipts are void under the provisions of Section 1858(b) and (f) of the Civil Code of California. The basis of this claim is that Section 1858(b) states that warehouse receipts must distinctly state on their face the rate of storage charges per month or season. The non-negotiable warehouse receipts which are the subject of this controversy, contain on the face thereof the following statement:

> "Subject to lien for storage, handling, insurance and other charges as per contract and lease with the industry served."

Appellant's claim is that the above quoted statement is not a sufficient compliance with Section 1858(b) and that the absence of specific charges on the face of the receipt render the receipts void.

We maintained in the Court below, and maintain here, (1) that the issuance of and the form, contents and effect of warehouse receipts in the State of California are governed by the provisions of the Uniform Warehouse Receipts Act and not by Section 1858 of the Civil Code; (2) that the receipts involved herein conform to the provisions of the Uniform Warehouse Receipts Act; (3) that even should the Court consider Section 1858 to be applicable, the receipts are still valid in the hands of the bank; (4) that the reference to storage charges contained on the receipts is sufficient under either statute.

It is undisputed that if these warehouse receipts are valid, appellant has no cause of action against appellee Lawrence Warehouse Company.

ARGUMENT.

Appellant's brief abounds in citations supporting general propositions with which there can be no quarrel, but which have no application to the case at bar. In view of the great weight of authority upholding the validity of these receipts, we feel that it would serve no useful purpose to answer appellant's brief in detail. Instead we shall present a positive argument supporting our position, and in the course

of this argument we shall comment on the few cases cited by appellant which deserve mention.

In the consideration of this case, these receipts receive the benefit of the presumption of legality established by Section 1643 of the Civil Code which reads:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

Appellee Lawrence Warehouse Company submits that the warehouse receipts in issue are valid and the decision and judgment of the District Court is correct. Appellee's brief in support of its position will be divided into three parts. Part One will first demonstrate that the Uniform Warehouse Receipts Act (California General Laws, Act 9059, hereinafter called "Uniform Act") and not Section 1858 of the Civil Code of the State of California governs the decision of this case. Then it will be shown that the receipts in question are valid under the Uniform Act. Appellee firmly believes that this completely disposes of appellant's case.

For the sake of argument, however, we shall then proceed to demonstrate in Part II that, even if this case is governed by Section 1858, appellant cannot prevail. This position is taken on the following grounds:

1. A violation of the requirements of Section 1858 does not invalidate a warehouse receipt;

2. The receipts in question comply with Section 1858.

Part Three will merely show that there is no issue of an illegal preference involved in this appeal.

PART I.

THE RECEIPTS INVOLVED HEREIN ARE VALID UNDER SECTION 2 OF THE UNIFORM NEGOTIABLE WAREHOUSE RECEIPTS ACT.

(a) The Uniform Warehouse Receipts Act controls the decision in this case.

Appellant's entire case rests on the theory that Section 1858 invalidates these warehouse receipts. He studiously avoids any mention of the Uniform Negotiable Warehouse Receipts Act. It is our contention that appellant's theory is erroneous. We submit that the Uniform Act was intended to revise completely the statutory law of California with regard to warehouse receipts and to supersede Section 1858.

Let us first compare the two statutes in a general way. Section 1858 was adopted in 1901 and contains only seven subdivisions while the Uniform Act was adopted in 1909 and has sixty sections dealing with every phase of warehousing. It is immediately apparent that the Uniform Act is a much more mature and considered statute. There are differences, however, not only in the quality of the two laws; they are often inconsistent and contradictory. We shall set forth a few examples. The last clause of Section

1858 prohibits the issuance of a second receipt on property on which there is already an outstanding receipt. This would apparently preclude the issuance of duplicate receipts which is permitted by Section 6 of the Uniform Act. Certainly the definitions of negotiable and non-negotiable receipts found in Sections 4 and 5 of the Uniform Act are the controlling definitions in California today. A non-negotiable receipt is not even defined in Section 1858, and the definition of a negotiable receipt is, to say the least, cumbersome. The earlier statute requires the words "non-negotiable" to be printed in red ink. The Uniform Act does not specify any particular color. (Under appellant's theory a receipt would be void if the words "non-negotiable" were printed in black!) The Uniform Act contains no provision requiring the warehouseman to indorse on the back of the receipt "the amount and date of delivery" prior to delivery of the goods as does Section 1858(c).

A further catalogue of inconsistencies and contradictions is unnecessary. It is apparent that Section 1858 differs radically from the Uniform Act. The two cannot be regarded as merely complementing each other. There are too many ways in which they conflict to permit them to exist side by side. One must have precedence, and, as we shall demonstrate, it has long since been decided that the Uniform Act is paramount.

Now let us turn to a comparison of these statutes as they touch the receipts in issue. Both Section 1858 of the Civil Code and Section 2 of the Uniform

Act prescribe the contents of warehouse receipts. The purpose of both statutes was to provide a certain degree of protection to receipt holders (who, let it be noted, are not necessarily the depositors). Compared to the protection later given by Section 2 of the Uniform Act, that conferred by Section 1858 is crude and incomplete. Clearly the later act was intended to elaborate and supersede the earlier. If, as contended by appellant, Section 1858 requires the Court to hold these receipts void (in conflict with the interpretation of the Uniform Act) then it, or so much of it as requires this result, was repealed by the enactment of the later statute.

Appellant's brief cites and quotes many general statements concerning the repeal of statutes by later enactments. With these statements we have neither quarrel nor concern. They do not apply to this case because the provisions of the Uniform Act are specific as to its effect on earlier laws, and the Courts, including the Supreme Court of the United States, this Court and the California Courts—have consistently adhered to the policy of looking only to the Uniform Act.

Sections 57 and 60 of the Uniform Act read as follows:

> "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." (Section 57).
>
> "All acts or parts of acts inconsistent with this act are hereby repealed." (Section 60).

These sections are not merely empty phrases. They state clearly what they mean and they mean exactly what they say. The Courts have so held.

The Supreme Court of the United States has said the following as to the effect of the Uniform Act:

> "It is said that under the law of Louisiana, as it stood prior to the enactment of the uniform warehouse receipts act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank (cases cited); and it is urged that the new statute is but a step in the development of the law, and that decisions under the former state statutes are safe guides to its construction. * * * It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. * * * This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the uniform act, and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the act—which has been adopted in many states—is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the states dealing with such documents, but there still remained diversity of legal rights under similar commercial trans-

actions. We think that the principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it;" *(Commercial Nat. Bank v. Canal-Louisiana B. & T. Co.,* 239 U. S. 520, 528-529, 60 L. Ed. 417, 421-422 (1915).)

This Court in the case of *Heffron v. Bank of America,* 113 F. (2d) 240 (1940), declared that Section 3440 of the Civil Code of California was repealed in so far as it interfered with the operation of the Uniform Act:

> "The California Warehouse Receipts Act, Deering's General Laws, 1937, Act 9059, enacted in 1909 and several times amended, expressly repeals all acts or parts of acts in conflict with it. We are satisfied that this statute exclusively governs the decision to be made here." (p. 242.)

> "Indeed the general scheme of the Warehouse Receipts Act to achieve uniformity, and to effect the secure and ready use of warehouse receipts as instruments of credit, is inconsistent with the notion that the business world must look to something other than the observance of the definite and comprehensive terms of the act itself." (p. 243.)

The California Court in *Jewett v. City Transfer & Storage Co.,* 128 C. A. 556 (1933), reached a similar result, saying:

> "Although in the law the repeal of a statute by implication is not favored, when on comparison of the later law with the earlier statute

it becomes apparent that the later law is a revision of the entire subject matter embodied in the respective legislative acts, and that it is designed as a substitute for the earlier statute, the later law is deemed to supersede or repeal the earlier one. * * *

"Considering the provisions of the statute known as the Warehouse Receipts Act, it is apparent that its purpose was to revise the entire subject matter relating to the general business of conducting a public warehouse. As hereinbefore indicated, if by any legal reason it may be held that any of the provisions of Sections 3051 and 3052 of the Civil Code apply to the subject of liens of warehousemen, those provisions, as to such liens, must be deemed repealed by the later legislative act." (pages 561 and 562.)

See also:

Salt River Valley Water Users Ass'n. v. Peoria Ginning Co., 231 P. 415 (Ariz., 1924);

Mason v. Exporters & Traders Compress Co., 94 S. W. (2d) 758 (Tex., 1936).

In view of this insistence on uniformity, it cannot be contended that the California Legislature intended to permit Section 1858 to interfere with the Uniform Act.

(b) These receipts are valid under the uniform act.

It is our belief that the statement printed on the face of the warehouse receipts here in question in effect incorporated into those receipts the specific

contracts setting forth the various warehouse charges and therefore is a valid compliance with Section 1858 and Section 2 of the Uniform Act. For the sake of argument, however, let us assume that our views are incorrect and that there was no statement on the warehouse receipt with reference to charges.

What then have the Courts found to be the effect of the omission from a warehouse receipt of one of the requirements of Section 2? Appellant's brief is so barren of cases dealing with this subject that the Court might be led to believe that this was a matter of first impression. Such is far from the case. A long line of decisions consistently upholds the validity of receipts which are lacking one or more of the requirements of that section.

In *Equitable Trust Co. v. A. C. White Lumber Co.*, 41 F. (2d) 60 (D. C. Id., 1930), the Court dealt with the appellee's contention in the following language:

> "The only purpose of embodying in the receipt the rate of storage charges, or liabilities incurred by the warehouseman, is to preserve the lien and secure the payment to the warehouseman of such charges. (Citing cases). So the proper construction of the statute, when applied to the receipts in question, is that the receipts are not rendered invalid or non-negotiable by the omission of the rate of storage charges, if such appears therein." (p. 65.)

The Illinois Supreme Court in *Manufacturer's Mercantile Co. v. Monarch Refrigerating Co.*, 107 N. E.

885 (1915), reached the same result as to receipts on which the storage charges were left blank, saying:

> "The requirements of Section 2 were imposed for the benefit of the holder of the receipt and of the purchasers from him. It was not intended that a failure to observe them should render the receipt void in the hands of the holder." (p. 887.)

In *New Jersey Title Guarantee & Trust Co. v. Rector,* 75 A. 931 (N. J. 1910), the Court held that the omission of storage charges did not affect the validity of a receipt. It said at page 932:

> "The receipt in this case is not a negotiable one, and it is not pretended that any person has suffered any damage because of the alleged omission of two of the terms named in the act, but the warehouseman in such case is liable under Section 7 to any person purchasing a receipt, supposing it to be negotiable, if the warehouseman neglects to mark it 'non-negotiable.' In each case the terms recited in the act are rather for the benefit of third persons or innocent holders than the original parties, and in either case omissions do not destroy the character of the writing as a warehouseman's receipt."

See also:

> *Joseph v. P. Viane, Inc.,* 194 N.Y.S. 235 (1922), a case in which the receipt contained almost none of the requirements of Section 2 and was still held valid.

It could serve no useful purpose to discuss and quote from all of the decisions sustaining the validity of these receipts. Suffice it to say that in each of

the following cases the validity of the receipts in question was upheld.

Woldson v. Davenport Mill & Elevator Co., 13 P. (2d) 478 (Wash. 1932) (Section 53 of the Uniform Act provided a criminal penalty for failing to state that the goods covered by a receipt were owned by the warehouseman. Despite the fact that this was not done the receipts were held valid);

Smith Bros. Co. v. Reicheimer, 83 So. 255 (La. 1919) (rate of storage omitted);

Arbuthnot v. Reicheimer, 72 So. 251 (La. 1916 (rate of storage omitted);

In re Quaker City Cold Storage Co., 49 F. Supp. 60 (D.C. Pa. 1943) (affd. 138 F. (2d) 566) (C.C.A. 3rd 1943) (amount of advances unspecified);

Laube v. Seattle Nat. Bank, 228 P. 594 (Wash. 1924) (location of warehouse not stated);

Finn v. Erickson, 269 P. 232 (Ore. 1928) (charges and advances omitted);

Bank of California Nat. Ass'n. v. Schmalz, 9 P. (2d) 112 (Ore. 1932) (receipts not numbered consecutively).

Appellant attempts to avoid this obvious conflict between his interpretation of Section 1858 and the general interpretation of Section 2. He says that the Uniform Act is not a penal act. Even a superficial reading of Sections 50 through 55 shows this to be an erroneous assumption. These sections set forth criminal penalties for:

(1) Issuance of receipts for goods which have not been received.

(2) Issuance of receipts containing false statements.

(3) Issuance of receipts not stating fact that the commodities are owned by warehouseman.

(4) Delivery of goods without obtaining the surrender of a negotiable receipt.

(5) The negotiation of a receipt issued for mortgaged goods.

Here we see a comprehensive treatment of the criminal penalties connected with warehouse receipts. It would be difficult to contend that the legislature also intended the Courts to look to other antecedent statutes for further penalties on subjects specifically covered by the Uniform Act.

Appellant also says that Section 1858 is merely cumulative—that is to say that it merely adds a more severe penalty to those provided by the Uniform Act. Yet the basis of his action is that Section 1858 makes the receipts invalid, whereas under the Uniform Act they would be valid. Surely this is a substantive difference in direct conflict with and thwarting the purposes of the Uniform Act.

It must be remembered that field warehousing is an old and well established business. The following facts with respect to it will be found in *Financing Inventory on Field Warehouse Receipts,* Jacoby and Saulnier (National Bureau of Economic Research

1944), pages 43 *et seq.* In 1941, almost two-thirds of the banks in the United States which engaged in business loans did some financing by means of warehouse receipts. The loans against such receipts aggregated over $130,000,000.00 and formed 2% of the "commercial and industrial" loans of commercial banks. It is noteworthy that the Pacific Coast is one of the two geographic regions having the highest frequency of this type of financing. This is mainly due to the great number of canning and lumber concerns which find it particularly suited to their needs.

Appellee, Lawrence Warehouse Company, now conducts more than 2,000 field warehouses in almost every state. It is only one of the companies so engaged. The receipts under consideration embody the standard method for quoting storage rates for field warehousing. In such form the receipts are valid all over the United States. It would indeed be unfortunate if, after the adoption of the Uniform Act, a different result should obtain in California.

We hold to the premise that in adopting the Uniform Act, the California Legislature believed that it was fostering uniformity, standardizing a method of financing by means of warehouse receipts and facilitating commercial intercourse. The decisions of the Courts fully support this premise. Such purposes can hardly be realized if warehouse receipts, valid in all other jurisdictions, are invalid in California because of a statute which far antedates the Uniform Act.

We submit that Section 1858 of the Civil Code of California, or so much of it as is inconsistent with the Uniform Act, was repealed by the adoption of the latter. As the receipts in question are valid under the Uniform Act, appellant's cause of action against appellee Lawrence Warehouse Company must fail.

PART II.

POINT 1.

SECTION 1858 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA DOES NOT INTEND TO INVALIDATE RECEIPTS ISSUED IN VIOLATION THEREOF.

We have shown that Section 1858 has no application to this case. Conceding its application, however, for the sake of argument, it does not follow, as claimed by appellant, that these receipts are void.

Appellant cites a plethora of cases supporting the proposition that contracts made in violation of a criminal statute are void. With this proposition as it is applied in the cited cases we take no issue. We wish to point out, however, that none of these cases deals with Section 1858 or with warehouse receipts. Almost without exception they deal with the sale of land on the basis of unrecorded maps, with contracts made by public officials as individuals with the community which they serve, with the failure to secure a real estate broker's license, and with the sale of securities in violation of the California Corporate Securities Act. (In this connection it is interesting to

note that such sales do not always invalidate the securities under California law. (*Eberhard v. Pacific Southwest L. & M. Corp.,* 215 Cal. 226 (1932); 34 Cal. Law Review 543, 552 (1946).)

Appellant seems to forget that there are no iron-clad rules of statutory construction. The primary task in each case is to determine the intent of the legislature passing the statute. In the cases cited by appellant the legislature either specifically declared contracts made in violation of statutes void or the purpose of the legislation could be accomplished only by invalidating them. The rule stated in 6 R.C.L. 701, reads as follows:

> "The rule that a contract is invalid if it conflicts with a statute is, however, not an inflexible one. It is only when the statute is silent, and contains nothing from which the contrary is to be inferred, that the contract is void. Therefore where a statute which prohibits a contract at the same time also limits the effect, or declares the consequences which shall attach to the making of it, the general rule that contracts prohibited by statute are void does not apply."

Our task is, then, to determine the legislative intent in enacting Section 1858.

In conformity with the rule stated above, most statutes of the type of Section 1858 have been held not to invalidate contracts made in violation thereof. The Supreme Court of the United States in *Harris v. Runnels,* 12 How. 79, 84, 13 L. Ed. 901, 903 (1851), dealt with a similar statute in the following language:

> "It is true that a statute, containing a prohibition and a penalty, makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the Legislature to avoid a contract made in contravention of it."

One of the most elaborate discussions of the precedents on this point is to be found in *In re T. H. Bunch Co.,* 180 F. 519 (D. C. Ark., 1910) where at page 527, the Court said:

> "When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable."

See also:

Adams Express Co. v. Darden, 286 F. 61 (C.C.A. 6th, 1923);

Furlong v. Johnston, 204 N.Y.S. 710 (App. Div. 1924);

Uhlmann v. Kin Dow, 193 P. 435 (Ore. 1920).

The above rule has been specifically recognized by the Supreme Court of the State of California in *Bentley v. Hurlburt,* 153 C. 796 (1908), in the following language:

> "The rule [that a contract in violation of a statute is void] is, however, not without exceptions. In *Harris v. Runnels,* 12 How. (U. S.) 79, the Supreme Court of the United States, said 'Before

> the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether the makers of it meant that a contract in contravention of it should be void, or that it was not to be so'." (p. 801.)

It is submitted that in prescribing a criminal penalty and civil liability for damages, the Legislature intended to set forth all of the penalties and effects of Section 1858. As stated before, the requirements that the storage charges be stated on the receipt is to protect the holder of the receipt against secret liens. The penalties set forth fully accomplish this. First, a criminal penalty is provided as a punishment and a deterrent; then a civil remedy is given to the injured party. What more is needed? Certainly there is nothing in what is sought to be accomplished which demands that a warehouse receipt—which often circulates freely and is the basis of many commercial transactions—be void.

After arguing that these receipts are void, appellant found himself in an uncomfortable position. He had run squarely against the rule that the Courts will take no action with respect to an illegal contract, but will leave the parties in the position in which it finds them. Desperately he snatched at those few cases—mostly dealing with the sale of securities in violation of the Corporate Securities Act—in which the Court decreed restitution for two reasons: First, if it had not done

so, the evil that the statute was seeking to prevent would have been accomplished; Second, because special equities existed in favor of the plaintiff.

Neither of these conditions is present here. It would be ridiculous to contend that it was necessary for appellant to recover the value of these goods, in order to carry out the purpose of a statute requiring the rate of storage to appear on the face of receipts. Appellant stands in no better position than his predecessor in interest. The bankrupt had signed the warehousing contract containing the storage rates and had accepted the receipts based thereon. These receipts were pledged to secure loans. Appellant does not contend that the bankrupt did not receive these sums for use in connection with its business. Nor is it claimed that any creditor was injured or prejudiced. Obviously the bankrupt's estate will be unjustly enriched to the extent of any judgment recovered.

Appellee submits (a) that the Legislature intended the penalties and remedies of Section 1858(f) to provide the sole effect of a violation of that section; (b) that receipts omitting a requirement of subdivision (b) thereof are valid warehouse receipts.

POINT 2.

(a) THE PHRASE "SUBJECT TO LIEN FOR STORAGE, HANDLING, INSURANCE AND OTHER CHARGES AS PER CONTRACT AND LEASE WITH THE INDUSTRY SERVED" WHICH APPEARED ON THE FACE OF THE RECEIPT WAS SUFFICIENT IN ITSELF TO SATISFY THE STATUTORY REQUIREMENTS.

It has been established that substantial compliance with the statutory requirements governing the contents of a warehouse receipt is sufficient. (*Standard Bank of Canada v. Lowman,* 1 F. (2d) 935 (D.C. Wash., 1924).

In *Boas v. De Pue Warehouse Co.,* 69 C. A. 246 (1924) (Sup. Ct. denied petition for hearing December 15, 1924), this rule was applied by a California Court to the statement of storage charges. In answer to the claim that a warehouseman's lien for charges extended only to those charges which were mentioned on the receipt, the Court said (pp. 249-250):

> "A warehouseman does not lose his lien for charges by failure to fully insert them in a non-negotiable receipt. The purchaser of a non-negotiable instrument is put upon notice that there may be a lien for charges not mentioned therein. * * *.
>
> One to whom a receipt has thus been transferred acquires thereby as against the transferor the title to the goods subject to the terms of any agreement with the transferor * * *.
>
> A warehouseman issuing a non-negotiable receipt which contains, as here, a recital that the goods stored are subject to a lien for charges is entitled to a lien to the extent of such charges,

> even though the amount is not stated in the receipt (Western Bank v. Marion Distilling Co., 89 Ky. 91 (5 S.W. 458)), and such recital is sufficient to put the assignee upon notice of the warehouseman's lien (Security Bank v. Minneapolis Cold Storage Co., 55 Minn. 101 (56 N.W. 582))."

It is noteworthy that in reaching its decision the Court ignored Section 1858 and discussed only the Uniform Act. If the Court had felt that Section 1858 was applicable this receipt would have clearly violated subsection (c) thereof. It is submitted that this case requires a holding that the receipts in issue are valid.

In the *Minneapolis Cold Storage* case, cited above by the Court, the receipt said that the goods were deliverable "upon the payment of charges" and then left the amounts blank. The Court held that this gave the transferee of the receipt sufficient notice of the possibility of charges to support the warehouseman's lien (See also: *Stein v. Rheinstrom,* 50 N. W. 827 (Minn. 1891)).

It seems clear that the Courts view the statement of storage charges on the receipt as a means of protecting a receipt holder, especially a negotiable receipt holder, from secret liens. The above cases demonstrate that wording which is more indefinite than that contained on the face of the Lawrence receipts will accomplish this purpose. Certainly if a California Court will uphold a lien for charges which are not stated, it can scarcely be contended that a

failure to set forth these charges invalidates the receipt.

It is submitted that the phrase "subject to lien for storage, handling, insurance and other charges as per contract and lease with the industry served" which appeared on the Lawrence receipt accomplishes the legislative purpose and satisfies the requirements of Section 1858 of the Civil Code.

(b) THE WAREHOUSING CONTRACT WHICH CONTAINED A DETAILED STATEMENT OF STORAGE RATES WAS INCORPORATED BY REFERENCE INTO THE RECEIPTS.

These receipts specifically state that the storage rates shall be those set forth in the contract and lease between Lawrence and "the industry served", which in this case is the C. A. Reed Furniture Company. It is well established that writings referred to in a contract shall be construed as part of the contract, 3 *Williston on Contracts,* Rev. Ed. 1801; 17 *C.J.S.* 716. This doctrine has been applied to warehouse receipts (*Kirkpatrick v. Lebus,* 211 S. W. 572 (Ky. 1919)). It is also well established that parol evidence is acceptable to explain a warehouse receipt *(Starr v. Beerman,* 189 N.Y.S. 174 (App. Div. 1921)) and that the previous course of dealings between the parties is competent evidence as to the meaning of receipts *(Blackburn Trading Corp. v. Export Fr. Forwarding Co.,* 198 N.Y.S. 133 (App. Div. 1923)).

This receipt is in the form usually found in field warehousing. The very nature of this type of opera-

tion makes it impossible to charge an ordinary tariff rate. Conditions vary in each industry. The amount of work necessary to preserve the stored commodities, the number and salaries of the employees and several other factors make it necessary to evolve a more flexible rate structure. It has not been the custom to list these charges on the receipt. It is a basic rule that established custom and usage is admissable to aid statutory construction (*People v. Borda,* 105 C. 636 (1895)).

Appellee submits that this reference to and incorporation of the contract in the receipt satisfied the statutory requirements.

PART III.

THERE IS NO ISSUE OF AN ILLEGAL PREFERENCE IN THIS ACTION.

Appellant's brief (page 14), attempts to interject the issue of a bankruptcy preference into this action. We submit that this is wholly unwarranted and unjustified. Appellant's complaint states one, and only one, cause of action against Lawrence Warehouse Company. A cause of action for conversion resulting from the alleged invalidity of these receipts. There are no facts alleged from which an action for an illegal preference could even be implied. The issue would raise many complicated questions of fact and law which are not part of this action in any way.

We submit that the preference issue not being raised in the pleadings, and not having been tried in

the lower Court, is not before this Court in any form and that so much of appellant's brief as deals with it should be disregarded.

CONCLUSION.

Appellee submits that appellant has attempted to establish a cause of action by falling into the double error of misconstruing an inapplicable statute. The decision in this case is governed by the Uniform Warehouse Receipts Act not by Section 1858 of the Civil Code, which was repealed by the later comprehensive codification of warehouse law. There is no doubt but that these receipts are valid under the cases construing the Uniform Act. As we have shown, however, appellant cannot prevail even under Section 1858 with whose provisions the receipts complied and which does not make receipts issued in violation thereof void.

It is respectfully submitted that the judgment of the lower Court should be affirmed.

Dated, San Francisco,
April 15, 1948.

Respectfully submitted,
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